Supreme Court, U.S.
FILED
SEP 30 2002
CLERK

No. 02-299

In The
Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF OF RESPONDENTS IN OPPOSITION

MICHAEL R. FONTHAM*
PAUL L. ZIMMERING
NOEL J. DARCE
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3200

Counsel for Respondents

**Counsel of Record*

September 30, 2002

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a holding company system violates the objective terms of a rate schedule approved by the Federal Energy Regulatory Commission ("FERC") and overcharges one of its subsidiaries, does the Supremacy Clause require a state regulatory commission to pass the excess charges through to retail ratepayers?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
1. Overview	1
2. FERC ERS proceeding	2
3. Louisiana "Formula Rate" proceeding	4
4. Louisiana state court appeal	7
REASONS FOR DENYING THE WRIT	7
I. THE LOUISIANA COMMISSION'S ORDER DOES NOT CONFLICT WITH THIS COURT'S RULINGS, BUT INSTEAD IS CONSISTENT WITH PRECEDENTS HOLDING THAT THE FILED-RATE DOCTRINE DOES NOT REQUIRE THAT ISSUES OF TARIFF COMPLIANCE BE DECIDED ONLY BY THE AGENCY WITH AUTHORITY TO APPROVE THE TARIFF	9
II. THE PETITION PRESENTS AN UNUSUAL, NONRECURRING ISSUE OF SMALL CONSEQUENCE THAT IS NOT WORTHY OF THIS COURT'S CONSIDERATION	20
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
CASES	
Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n, 461 U.S. 375, 103 S. Ct. 1905 (1983)	17
Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166 (9th Cir. 2002)	12, 13, 14
Concord v. F.E.R.C., 293 U.S. App. D.C. 374, 955 F.2d 67 (1992)	11
Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F. Supp. 225 (S.D.N.Y. 1982)	13
Duquesne Light Co. v. Barasch, 488 U.S. 299, 109 S. Ct. 609 (1989)	21
Ex Parte Louisiana Power & Light Co., Order No. U-20925 (corrected), 1995 La. PUC LEXIS 39 (La. P.S.C. 1995)	4
Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S. Ct. 281 (1944)	21
Great N. R. Co., v. Merchants Elevator Co., 259 U.S. 285, 42 S. Ct. 477 (1922)	11
Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465 (5th Cir. 1987)	12
Gulf States Utilities Co. v. Louisiana Pub. Serv. Comm'n, 689 So. 2d 1337 (La. 1997)	15
Louisiana Pub. Serv. Comm'n v. F.E.R.C., 174 F.3d 218 (D.C. Cir. 1999)	3
Louisiana Pub. Serv. Comm'n v. F.E.R.C., 184 F.3d 892 (D.C. Cir. 1999)	18

TABLE OF AUTHORITIES – Continued

Page

Mississippi Power & Light Co., v. Mississippi, 487 U.S. 354, 108 S. Ct. 2428 (1988) 8, 10, 16, 17

Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 106 S. Ct. 2349 (1986) 8, 10, 17

National Communications Ass'n v. AT&T Corp., 46 F.3d 220 (2d Cir. 1995) 14, 16, 17

New Orleans Pub. Serv. Inc. v. Council of New Orleans, 911 F.2d 993 (5th Cir. 1990) 17

Pennsylvania R. Co. v. Chromcraft Corp., 424 S.W.2d 104 (Mo. Ct. App. 1967) 14

Pennsylvania R. Co. v. Nasshorn, 116 N.Y.S.2d 365 (N.Y. App. Div. 1952) 14

Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n, 465 A.2d 735 (Pa. Cmwlth. 1983) 19

Southern Pacific Transport Co. v. San Antonio, 748 F.2d 266 (5th Cir. 1984) 13

Union Pac. R. R. v. Structural Steel & Forge Co., 344 P.2d 157 (Utah, 1959) 13

United States v. Garner, 134 F. Supp. 16 (E.D.N.C. 1955) 13

STATUTES

16 U.S.C. §§ 824d,e 11

STATEMENT OF THE CASE

1. Overview. The petitioner, Entergy Louisiana, Inc. ("ELI"), a subsidiary of Entergy Corp. ("Entergy"), seeks a determination that the filed-rate doctrine requires a state ratemaking commission to pass through in retail rates *excess costs* that are assessed to a utility by its holding company parent in violation of the objective requirements of a tariff approved by the Federal Energy Regulatory Commission ("FERC"). The "prudence" determination of the Louisiana Public Service Commission ("Louisiana Commission" or "Commission") examined the reasonableness of ELI's decision to pay costs assessed to it in violation of the unambiguous requirements of the tariff. The case does not involve a reexamination of the FERC's allocation decision or the utility's decision to be part of a holding company system. Instead, the Louisiana Commission's decision enforced the requirements of federal law.

The applicable tariff was approved by the FERC in 1997 after it determined that the Entergy System's Operating Committee ("Entergy") or ("Operating Committee") had violated the preexisting version of a tariff ("Schedule MSS-1") that allocates costs for "available" system capacity among the Entergy Operating Companies. For more than a decade, Entergy assessed charges for mothballed units – those placed in "extended reserve shutdown" ("ERS") – as if these units were "available" to operate. The FERC declared this action a tariff violation, but exercised its discretion not to order refunds. Instead, to remedy the violation, the FERC adopted a new tariff to precisely "define the parameters that the Entergy Operating Committee must follow in determining whether a unit is eligible for inclusion in Schedule MSS-1." [Pet. App. at 164a]. The Operating Committee thereafter declared that

all the ERS units previously included in MSS-1 should continue to be included, without even considering crucial parameters specified by the FERC.

The Louisiana Commission's Order disallows only those costs that were assessed in violation of the tariff. An administrative law judge ("ALJ") and the Louisiana Commission found that the tariff was violated, after a contested hearing on the issue, and that factual finding was not appealed by ELI. Entergy returned the ERS units to service when energy prices soared after 1997, so the issue regarding this tariff violation will not recur. The disallowance involves only a portion of one year's excess ERS payments, which averaged about $1.6 million per year for ELI. [Pet. App. at 141a (FERC computation using 1987-93 data)]. This amount is a fraction of the excess earnings permitted ELI under a Formula Rate Plan that allows the company to "share" profits in excess of its cost of capital. The excess earnings allowed in 1997 were more than $27 million.

2. FERC ERS proceeding. In 1993, in an order approving the merger of Entergy and Gulf States Utilities Company, the FERC instituted an investigation of whether Entergy had violated its System Agreement by treating ERS units as "available" for cost sharing under Service Schedule MSS-1 of the Entergy System Agreement. [*See* Pet. App. at 85a-86a]. That schedule provides the mechanism for equalizing the cost of the System's "available" generating capability among the Entergy Operating Companies.

Paragraph 10.02 of the System Agreement defined the term "available." It required that a unit, to be eligible for cost sharing, have capability that "can be demonstrated and (1) is under the control of the System Operator, or (2)

is down for maintenance or nuclear refueling." [Pet. App. at 89a]. ERS capacity met neither of these conditions. Indeed, the ERS capacity on the Entergy System was placed in storage for an indefinite time period, in a state of ill repair, and required extensive refurbishment to provide electricity to the System. [*Id.* at 123a]. Nevertheless, the Entergy Operating Committee exercised its purported "discretion" to include the units as available for cost sharing. [*Id.* at 125a]. This action increased the cost assessments to ELI and Entergy Mississippi, Inc. in comparison to what the costs otherwise would have been; it benefited Entergy Arkansas, Inc. and Entergy New Orleans, Inc., which had more-than-proportionate ERS capacity. Entergy acted to avoid changes in MSS-1 payments and receipts, which might have required the initiation of retail rate cases. *See Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, 174 F.3d 218, 229 (D.C. Cir. 1999).

After an evidentiary hearing, a FERC administrative law judge determined that Entergy violated a "clear and unambiguous" tariff by unilaterally declaring the ERS units available. [Pet. App. at 124a]. The judge recommended against a refund remedy, however, and instead determined that a new tariff provision should be adopted to "adequately address the treatment of the ERS units" and set out "the parameters of the Operating Committee's discretion." [*Id.* at 151a-52a]. The FERC affirmed this decision, asserting that it could decline to order refunds because its "discretion is at its 'zenith' in fashioning remedies." [*Id.* at 101a]. The United States Court of Appeals for the District of Columbia Circuit affirmed, applying a "'particularly narrow scope of review.'" *Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, 174 F.3d 218, 224 (D.C. Cir. 1999).

3. Louisiana "Formula Rate" proceeding. In 1995, the Louisiana Commission adopted a Formula Rate Plan for ELI, in which the Company agreed to make annual filings with the Commission and adjust rates pursuant to a sharing formula. *Ex Parte Louisiana Power & Light Co.*, Order No. U-20925 (corrected), 1995 La. PUC LEXIS 39 (La. P.S.C. 1995). The plan established a rate of return deadband around the fair rate of return; if ELI's return fell within the deadband, no rate adjustment was required. Above the deadband, rates were lowered by 60 percent of the excess profit amount.

For the period commencing July 1, 1997, ELI filed a revised evaluation report under the Formula Rate Plan showing that it earned 15.04 percent on equity in the 1996 test year. [App. A]. Additionally, ELI and other parties stipulated that the fair rate of return in the rate effective period, commencing July 1, 1997, was 10.5 percent. [App. B]. The deadband around this rate of return was 9.7 to 11.3 percent – 80 basis points above and below the fair return. ELI reduced its rates by about $41 million to flow through to ratepayers 60 percent of the excess earnings above 11.3 percent. Commencing July 1, 1997, its rates remained sufficient to produce earnings about $27 million in excess of 11.3 percent.

Under the stipulation entered by the parties, three issues proceeded to hearing before the ALJ, including "whether payments under the System Agreement for the cost of generating units in Extended Reserve Shutdown should be included or excluded from ELI's revenue requirement." [Pet. App. at 25a]. The evidentiary examination focused on whether Entergy violated the terms of the new tariff adopted by the FERC effective August 5, 1997. Both ELI and the Commission Staff submitted evidence on this issue.

Under the revised tariff, an ERS unit could be considered "available" if it:

> *is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.*

[Pet. App. at 104a (emphasis in original)].

Soon after the tariff was revised, the Operating Committee met and declared that all "units currently in ERS status should continue to be deemed 'available' for the purposes of determining Company Capability, as that term is defined in Section 10.02 of the System Agreement." [9/30/97 Op. Comm. Minutes; App. C]. The minutes of the meeting do not reflect how the Operating Committee considered any parameter in the tariff. An attachment to the minutes indicated that the System would keep the units in ERS status for at least 10 years, with no projected return-to-service date for any unit. [*Id.*, Load and Cap. Forecast, Line 13]. Additionally, the Operating Committee had no information concerning the cost of maintaining the ERS units and incomplete information regarding the cost of returning them to service. As the administrative law judge and the Louisiana Commission found, the Operating Committee was provided "incomplete information contained in a single sheet of paper showing the estimated cost of return to service of the ERS units. . . . " [Pet. App. at 53a].

The Louisiana Commission Staff argued that costs assessed to ELI pursuant to tariff violations should not be assessed to retail ratepayers. Although the FERC decided not to order refunds for the period 1986-97, the Staff contended that the costs included in the 1996 test year could be disallowed because they were assessed in violation of the original FERC tariff. [Pet. App. at 44a]. The Staff also argued that the Operating Committee's perfunctory decision violated the new tariff and costs incurred pursuant to that decision should not be assessed to ratepayers.

As to the 1996 costs, the ALJ and the Commission held that the August 5, 1997 decision of the FERC retroactively validated Entergy's tariff violation, precluding a disallowance of costs assessed prior to that time. [*Id.* at 63a-64a]. With respect to the period after August 5, 1997, the ALJ and the Commission determined that Entergy's compliance with the new tariff, and the prudence of ELI in accepting costs assessed to it under the new tariff, could be examined. [*Id.* at 72a]. In that connection, they found that Entergy *again* violated the System Agreement. The judge and Commission determined that the Operating Committee made no serious effort to even consider the new parameters laid out by the FERC:

> The evidence does not show that the Operating Committee made efforts necessary to ascertain that ERS units would be needed within the next 10 years. The Operating Committee did not even seek the information necessary to reach a well-considered decision. The evidence shows that the Operating Committee failed to obtain the requisite data in order to reach a decision "based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, projected cost of maintaining such unit, and the projected cost of returning the unit to service."

[Pet. App. at 74a].

The judge and the Commission determined that ELI was imprudent for failing to minimize costs assessed to it in violation of the tariff. Thus, it ordered that "MSS-1 overpayments incurred on or after August 6, 1997 be removed from the company's calculation of its cost of service and credited back to the ratepayers." [*Id.* at 77a]. The disallowance affected only a portion of the rate-effective year, which began July 1, 1997.

4. Louisiana state court appeal. After litigating the tariff violation issue before the Louisiana Commission, ELI argued in the Louisiana state courts that the Commission could not disallow costs assessed by the Operating Committee or even consider whether the tariff was violated. The courts rejected these contentions. A state court judge ruled that "the Public Service Commission was neither arbitrary nor capricious in its finding that Entergy could not pass on the ELI overpayment to Louisiana customers." [Pet. App. at 22a]. A majority of the Louisiana Supreme Court determined that the record both supported the determination that Entergy violated the FERC tariff and was "devoid of any attempt by ELI to minimize its costs." [*Id.* at 20a]. Thus, the court affirmed the Louisiana Commission's ruling. [*Id.* at 20a-21a].

REASONS FOR DENYING THE WRIT

The action of the Louisiana Commission does not offend the "filed-rate" doctrine; rather, it is consistent with numerous federal and state decisions holding that issues

of tariff compliance are not within the exclusive jurisdiction of the regulatory agency that approved the tariff. Neither a court nor a state commission may contest the reasonableness of a FERC tariff, but they may determine whether the terms of the tariff were followed in assessing costs to affected parties. In this case, the Louisiana Commission found that Entergy violated the objective "parameters" established by the FERC. [Pet. App. at 104a]. In that situation, any reasonable, independent utility would refuse to pay the overcharge. Since ELI is bound by the prudence standard regardless of its affiliation with a parent, it is required to reasonably minimize costs and was correctly deemed imprudent for accepting the overcharge.

The Louisiana Commission's Order does not conflict with decisions of this Court because it does not contest a FERC cost allocation. Instead, it is consistent with rulings of this and other courts that the filed-rate doctrine does not prevent a court or state agency from determining whether a party violated a tariff. The prudence determination – a failure to minimize costs in the face of an excessive bill – is nothing like the cases relied on most prominently in the petition. In *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 108 S. Ct. 2428 (1988) ("*MP&L*"), for instance, a state sought to review the reasonableness of costs already deemed "just and reasonable" by the FERC. In *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986), a state agency sought to countermand a FERC power allocation. Here, the Louisiana Commission accepted and applied the terms of the FERC tariff.

The new rule ELI seeks would require a state agency to pass through costs assessed under a utility's interpretation

of a FERC tariff, even when the "interpretation" violates the tariff's objective terms. Under this proposed version of the filed-rate doctrine, the state agency would be bound to pass through the effects of *the utility's* cost misallocation and required to seek discretionary refunds from the FERC. This rule would unduly burden state regulators, delay justice to ratepayers, and undermine the traditional boundaries of state and national power in the federal system.

Contrary to ELI's claims, the issue here has little importance. The ERS program has concluded because spiraling energy prices after 1997 caused Entergy to place the ERS units in service. Thus, the tariff compliance issue has not recurred. The decision disallows only about $1.5 million from rates in a year in which $27 million of excess earnings were permitted in rates. ELI's perception that the Louisiana Commission harbors an "overall strategic plan" to threaten "the regime of the Federal Power Act" is baseless, but in any event this Court should not hear cases based on a petitioner's suspicion. [Pet. at 25]. Thus, the petition does not warrant review.

I. THE LOUISIANA COMMISSION'S ORDER DOES NOT CONFLICT WITH THIS COURT'S RULINGS, BUT INSTEAD IS CONSISTENT WITH PRECEDENTS HOLDING THAT THE FILED-RATE DOCTRINE DOES NOT REQUIRE THAT ISSUES OF TARIFF COMPLIANCE BE DECIDED ONLY BY THE AGENCY WITH AUTHORITY TO APPROVE THE TARIFF.

In claiming that the Louisiana Commission's Order conflicts with decisions of this Court, ELI confuses the prudence inquiry in the preemption cases it cites with the

prudence inquiry here. In *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 108 S. Ct. 2428 (1988) ("*MP&L*"), the Mississippi Supreme Court directed the Mississippi Public Service Commission to review the prudence of costs already found "just and reasonable" by the FERC. Since the FERC had exclusive jurisdiction to determine the prudence of the costs reflected in the tariff, this Court held that the state could not reexamine the correctness of its decision to include the costs. *Id.* at 2438. Similarly, in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986), the Court held that a state agency in setting retail rates may not reexamine the fairness of an affiliate power allocation that is imposed by the FERC under a wholesale tariff. *Id.* at 970.

In both of these cases, the Court precluded state agencies from questioning the prudence of costs assessed among affiliates *in compliance with* a FERC-approved rate. The decisions recognize that the Federal Power Act grants the FERC exclusive jurisdiction to establish wholesale rates; this "filed-rate" doctrine "binds both state and federal courts and is in the former respect mandated by the Supremacy Clause." *MP&L*, 487 U.S. at 371-72. But this Court has never held that the FERC must determine the consequences of a tariff *violation*. Indeed, the filed-rate doctrine does not reserve the issue of tariff compliance to the exclusive jurisdiction of the rate-setting agency.

Nothing in the Federal Power Act requires that the FERC decide whether a FERC tariff has been violated. Sections 205 and 206 of the Federal Power Act provide exclusive jurisdiction to the FERC to determine just and reasonable wholesale rates; Section 206 permits the FERC to make refunds for a limited period after the filing of a Complaint upon an ultimate finding that the filed rate was

BEST AVAILABLE COPY

not reasonable. 16 U.S.C. §§ 824d, 824e. The FERC has exercised the inherent power to provide refunds for tariff abuse, but that power is not specifically delegated in the statute. *See, e.g., Concord v. F.E.R.C.*, 293 U.S. App. D.C. 374, 955 F.2d 67, 73 (1992) (power to correct abuses "inferred" from general power to carry out purposes of the Act). This exercise of jurisdiction does not displace the power of courts and state agencies to consider disputes that come within their jurisdiction concerning tariff violations.

The power of a state court to interpret and apply a tariff was upheld by this Court when an elevator company sued in state court to recover costs that it alleged were assessed in violation of a tariff approved by the Interstate Commerce Commission. *Great N. R. Co., v. Merchants Elevator Co.*, 259 U.S. 285, 42 S. Ct. 477 (1922). The state courts construed the tariff and determined whether the charge was correctly assessed. This Court affirmed, holding that the tariff construction did not have to be determined by the ICC. It noted that the parties conceded the "validity of the tariff." *Id.* at 290. Further, although rate uniformity was a purpose of the Interstate Commerce Act, uniformity could be preserved through the process of appellate review. Thus, the Court determined that "the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission." *Id.* at 291. Instead, unless the matter requires the exercise of specialized agency expertise concerning the "peculiar meaning" of words, the state courts may construe a tariff. *Id.* at 292, 294.

The dividing line between reexamining and applying a tariff has been recognized by the lower federal courts in

resolving tariff disputes. For instance, before it merged with Entergy, Gulf States Utilities withheld payments to Alabama Power Co. and filed suit in federal court, claiming that it should not have to purchase electricity from that utility under a FERC-approved contract. *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). The defendant argued that only the FERC, not the courts, had jurisdiction because the contracts were filed with and approved by the FERC. [*Id.* at 1470]. The Fifth Circuit held that the Federal Power Act only preempted areas "reserved exclusively for the FERC." [*Id.*]. The Act preempts courts and regulators only from "changing the filed rate," "impos[ing] a rate different from the filed rate" or changing a "FERC allocation." [*Id.*]. But the court held that the doctrine did not prevent a determination that a utility billed excessive costs under a tariff. It said:

> Finally, GSU complains that Southern has sold more than it should have under Schedule E by overstating the amount of available "Long Term Power." The FPA does not preempt this claim. Unlike Hall in *Arkla*, GSU does not seek relief based on a rate different from the filed rate. Rather, GSU complains about the quantity sold *at the filed rate* under Schedule E. . . .
>
> *Id.* at 1472.

In a recent decision of the United States Court of Appeals for the Ninth Circuit, a communications carrier argued that the "filed-rate doctrine" prevented a federal district court from determining whether the carrier violated a tariff approved by the Federal Communications Commission. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). The Court found that the matter did not have to be heard at the FCC: "The filed-rate

doctrine precludes courts from deciding whether a tariff is reasonable, but it does not preclude courts from interpreting the provisions of a tariff and enforcing the tariff." *Id.* at 1171.

Other courts have recognized the distinction between applying a tariff and determining its reasonableness. The filed-rate doctrine does not require that the rate-setting agency determine whether a tariff has been violated. *See, e.g., United States v. Garner*, 134 F. Supp. 16, 18 (E.D.N.C. 1955) ("It is well settled that federal and state courts may entertain actions by shippers to recover freight charges which are in excess of those stated in tariffs duly and properly filed with the Commission, and in such actions the courts may decide questions of construction of tariffs as legal documents."); *Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc.*, 535 F. Supp. 225, 233 (S.D.N.Y. 1982) (Appropriateness of referral to FCC "turns on whether the tariff is being challenged, in which the primary jurisdiction referral is appropriate, or whether it is simply alleged that the tariff is being violated, where the referral is inappropriate."); *Southern Pacific Transp. Co. v. San Antonio,* 748 F.2d 266, 272 (5th Cir. 1984) ("[C]ourts often interpret the terms of a filed rate but refer to the I.C.C. any questions concerning the reasonableness of that rate.").

A number of state courts also have determined that the "filed-rate" doctrine does not prevent courts from determining whether a party followed the terms of a tariff. *See, e.g., Union Pac. R. R. v. Structural Steel & Forge Co.*, 344 P.2d 157, 160 (Utah, 1959) ("Since the words in the tariff are used in their ordinary meanings, their construction is a matter of law; uniformity in that construction can be guaranteed by the Supreme Court. The state court can

apply that legal construction to a state cause of action." (citations omitted)); *Pennsylvania R. Co. v. Nasshorn*, 116 N.Y.S. 2d 365 (N.Y. App. Div. 1952) (application of tariff classification is issue for courts); *Pennsylvania R. Co. v. Chromcraft Corp.*, 424 S.W.2d 104, 106 (Mo. Ct. App. 1967) ("Where . . . the issue between a shipper and a carrier is not the reasonableness of a rate but only the construction or interpretation of a published tariff the courts, including a state court, may entertain jurisdiction."). Since state courts may perform this function, so may a state agency.

The federal and state courts also have applied a "primary jurisdiction" doctrine, which permits them to defer in the exercise of their jurisdiction when the interpretation of a tariff requires special expertise presumably residing in the rate-setting agency. Thus, courts may defer when the issue is not within "the conventional experience of judges," but rather involves technical or policy considerations that first must be decided by the agency to protect a regulatory scheme. *National Communications Ass'n v. AT&T Corp.*, 46 F.3d 220, 222 (2d Cir. 1995); *Brown v. MCI Worldcom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). Assuming this doctrine applies to the states through the Supremacy Clause, it should be invoked only when a case presents a far-reaching and technical issue, central to a regulatory regime.

In this case, the FERC established straightforward terms to govern a narrow issue arising under the Entergy System Agreement. Entergy proceeded to bill ERS costs to ELI without making any reasonable effort to comply with the objective requirements of the tariff. The Louisiana Commission's Order accepts the tariff and its requirements. The terms are neither technical nor imbued with policy ramifications, and determining their meaning does

not require specialized expertise. Thus, neither the filed-rate doctrine nor the doctrine of primary jurisdiction precludes the Louisiana Commission from considering the tariff violation. Indeed, ELI has neither invoked the doctrine of primary jurisdiction nor contended that the FERC tariff involves issues outside the conventional experience of state regulators.

The prudence determination of the Louisiana Commission is grounded in state, not federal, law. The Commission simply determined that ELI did not act reasonably to minimize its costs when presented with excessive charges billed in violation of a FERC tariff. Under Louisiana law, a utility is obligated to provide service to customers at the lowest reasonable cost. The Louisiana Supreme Court articulated the standard in *Gulf States Utilities Co. v. Louisiana Pub. Serv. Comm'n*, 689 So. 2d 1337 (La. 1997), a case involving the prudence of fuel charges incurred by a utility. It said:

> Because ratepayers have only one power supplier, they are dependent on that supplier's management to make reasonable attempts to minimize costs through prudent decisionmaking. Therefore, the proper standard for determining whether a utility was imprudent is whether objectively that utility acted reasonably under the circumstances, because only the utility, and not the ratepayer, is in a position to minimize imprudence and maximize efficiency . . . .
>
> *Id.* at 1346.

Any reasonable utility, faced with an overcharge from a supplier, would refuse to pay the bill. If the seller believed the charge was correct, it would be required to file a suit to compel payment. Because ELI is a subsidiary of

Entergy, it accepted the excessive charge. But ELI's affiliation with Entergy does not absolve it of the prudence obligation. ELI, like an independent utility, was required to resist the unlawful charge. Its failure to do so violated the prudence standard.

A prudence disallowance for failing to object to charges billed in violation of a FERC tariff is nothing like a determination that the tariff itself unreasonably allocates costs. The *MP&L* determination, for instance, precludes a state commission from reexamining the prudence of costs that have already been included in rates by the FERC. *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354, 108 S. Ct. 2428 (1988). Thus, the Court determined that states "may not bar regulated utilities from passing through to retail customers *FERC-mandated* wholesale rates." *Id.* at 372 (emphasis added). But *MP&L* does not require the state agency to accept and pass through excessive charges billed in violation of the tariff – say, if Grand Gulf costs properly charged to another company had been billed to MP&L. Indeed, the Court indicated that a state agency might well be entitled to question a utility's decision to buy high-cost power "if it had the legal right to refuse to buy that power." *Id.* at 373-74.

Similarly, *Nantahala* requires a state commission to accept an allocation of power mandated by the FERC, but it does not require acceptance of an over-allocation imposed by a parent in violation of the clear terms of the tariff. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S. Ct. 2349 (1986). The key finding in *Nantahala* was that "Nantahala could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation

of what would be a fair allocation." *Nantahala*, 476 U.S. at 972-73. The North Carolina allocation was preempted because it conflicted with the FERC's determination, not because it conflicted with a parent's decision to improperly interpret a FERC tariff.

Construing *MP&L* and *Nantahala* to cover Entergy's self-serving tariff interpretation would give preemptive standing to a *breach* of federal law. Congress could not have intended the Federal Power Act, created to fill a "gap" because the states could not regulate interstate transactions, as precluding a state from disallowing an illegal charge imposed by a parent and accepted by a retail utility. *See Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377-80, 103 S. Ct. 1905 (1983) (Congress in enacting the Federal Power Act sought to fill regulatory gap resulting from Commerce Clause limitation on state power). The Louisiana Commission's prudence determination focused on the subsidiary's conduct and is not unlike many other decisions made at retail concerning holding company cost misallocations. If ELI believed that the charge was mandated by the FERC, it could have appealed the underlying ruling. But ELI made no effort to appeal that determination.

Nor does the existence of *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 911 F.2d 993 (5th Cir. 1990) ("*NOPSI*"), provide a reason for the Court to review this case. Whether *NOPSI* was inconsistent with *Nantahala* or not, the case was settled long ago. Entergy did not deem the decision of sufficient "national importance" to pursue review in this Court at the time rather than settling it. *NOPSI* did not involve a tariff violation, but a decision assertedly at odds with the FERC–mandated allocation of

Grand Gulf. Thus, it does not support the claim that this case merits review.

Undoubtedly ELI would argue that its proposal to preclude state agencies from interpreting tariffs would not require an agency to accept an excessive charge permanently, since a commission could file a complaint and seek relief at the FERC. But imposing this requirement would unduly burden state regulators. The expense of filing and litigating a complaint case in Washington, D.C. to obtain a discretionary remedy for a tariff violation may be prohibitive in many cases. Moreover, the FERC may delay setting a case for hearing for many years; the delay may preclude timely relief and in some cases prevent relief to the consumers who were forced to pay an overcharge. The Supremacy Clause is not designed to impose these unnecessary burdens.

The extent of the potential burden may be illustrated by reference to the history of a FERC Complaint Case filed by the Louisiana Commission. In 1995, the Louisiana Commission alleged that the Entergy System Agreement was discriminatory for its failure to provide credit for interruptible loads in allocating capacity costs. Since interruptible loads may be interrupted at times of peak load, they do not cause a need for new generating capacity, and under FERC precedent should not be assigned capacity costs. The FERC delayed acting on the complaint for more than a year and then dismissed it in an opinion later deemed "quintessentially arbitrary and capricious" by the United States Court of Appeals for the District of Columbia Circuit. *Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, 184 F.3d 892, 897 (D.C. Cir. 1999). The FERC also delayed acting on the obligatory application for rehearing for about a year. After a remand from the court of appeals, the

FERC again delayed acting for more than a year. When the Louisiana Commission sought mandamus relief in the court of appeals, the FERC suggested that it had discretion in ordering its priorities to delay hearing the case for *four to ten years*. [FERC Response at 6 n.1, *Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, No. 97-1661 (D.C. Cir.) (App. D)]. The FERC set the case for hearing in late 2000 – five years after it was filed – only when the Louisiana Commission sought mandamus relief in this Court, after the court of appeals denied the writ. *Louisiana Pub. Serv. Comm'n v. F.E.R.C.*, No. 00-405. The matter is currently before the FERC after an Initial Decision of an ALJ that was rendered more than a year ago.

Adopting the rule proposed by ELI would require state officials to accept an illegal charge, flow it through to ratepayers, and expend valuable resources seeking to correct the violation. It would largely insulate affiliate systems from the consequences of their own misconduct and limit the scope of the prudence obligation for these, as opposed to independent, companies. No valid basis exists to expand the filed rate doctrine to include incorrect affiliate "interpretations" within its scope.

ELI also argues that the *Pike County* line of cases, relied on by the Louisiana Supreme Court, is inapplicable to justify the prudence disallowance in this case. [Pet. at 16-17]. Admittedly, the facts are different, but the principle still applies. In *Pike County*, a court determined that a state agency was not precluded from reviewing the prudence of a subsidiary's decision to enter a power arrangement with its parent under a contract regulated by the FERC, rather than pursuing available market alternatives. *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A. 2d 735 (Pa. Cmwlth. 1983). Since the

prudence of the choice to enter the contract in the first place was not a matter exclusively within the FERC's jurisdiction, the state agency review was not precluded by the Supremacy Clause. Here, the case is much stronger. The utility chose to accept an overcharge assessed in violation of a FERC tariff. Its "choice" may have been influenced by the parent-subsidiary relationship, but it was not mandated by the FERC. Reviewing the prudence of this choice is a matter within the traditional purview of the states.

The ruling of the Louisiana Supreme Court does not conflict with decisions of this Court or the Supremacy Clause. The Louisiana Commission's disallowance conformed ELI's costs with the objective terms of a FERC tariff. This determination does not violate federal law.

II. THE PETITION PRESENTS AN UNUSUAL, NONRECURRING ISSUE OF SMALL CONSEQUENCE THAT IS NOT WORTHY OF THIS COURT'S CONSIDERATION.

The petition offers two grounds for portraying this case as imbued with great national importance. First, it asserts that the role of the FERC in regulating the electric industry under the Federal Power Act has importance and should not be supplanted by the States. [Pet. at 22-24]. Second, it suggests the Louisiana Commission has embarked on an "overall strategic plan" to disrupt the scheme of federal regulation of wholesale power. [Pet. at 25-26]. Neither assertion lends credence to the claim that this case is important. Indeed, the case involves a one-time, nonrecurring disallowance of about $1.5 million of ELI's costs in a year in which the utility was allowed overearnings that swamped the disallowance.

Surely ELI is correct that the electric power industry is important to the nation and electric coordination promotes national interests. Additionally, it is true that the FERC is in the best position to make power and cost allocations that involve conflicting state interests. But the Louisiana Commission did nothing to counter this federal scheme of regulation. It did not "relitigate" the terms of the tariff, but applied the tariff's objective terms and found a violation. That finding cannot be contested now because ELI, after litigating the issue before the Commission, did not raise it on appeal in the state courts. Thus, the Louisiana Commission's ruling accords fully with the requirements of federal law.

Presumably, Entergy's compliance with the tariff's requirements might have been litigated at the FERC. To the extent that avenue practically is available, the decision of the Louisiana Commission does not preclude it. Entergy could have asked the FERC for a declaration that compliance did not really require considering the matters set out in the tariff. But Entergy understandably did not do so, preferring to contend that the Supremacy Clause shields its own abuse from review in a state forum.

Nor is the case itself significant. The disallowance involves only a portion of ELI's annual ERS assessment, which averaged about $1.6 million in previous years. [Pet. App. at 141a]. For the same year, ELI was permitted earnings of $27 million in excess of its rate of return deadband. [App. A]. The disallowance serves only to lower, by a relatively small amount, the level of excess earnings. The *overall* impact of the Order on the utility thus could not be deemed unreasonable. *See Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S. Ct. 281, 288 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299,

311, 109 S. Ct. 609, 618 (1989). Additionally, the ERS units were brought into service after 1997, so the tariff violation will not recur. Thus, the issue has no ongoing consequence.

ELI's suspicion of an "overall strategic plan" to undermine "the regime of the Federal Power Act" does not merit consideration. First, the quotation of special counsel's comments to the Louisiana Commission in September, 2001 involved the wisdom of commencing a proceeding to examine the propriety of retail utilities giving up control or ownership of transmission assets now in the retail rate base. [App. E]. No utility, including ELI, has contended that issue is outside the Louisiana Commission's authority. The Louisiana Commission commenced a proceeding to examine the issue, and no party has contended that the issues are preempted.

Second, the Louisiana Commission's institution of a retail proceeding to investigate issues relating to the System Agreement – including huge cost differences revealed in 2001 in a FERC proceeding – in itself does no more than permit the acquisition of evidence. The Louisiana Commission also has filed a Complaint and sought relief at the FERC for the discriminatory cost allocation. Should the Louisiana Commission ever issue an Order that assertedly conflicts with FERC jurisdiction, the Court may consider the propriety of the decision in *that case*. Predicting the outcome, and examining the constitutionality of the prediction, is not an efficient use of the Court's resources.

In this case, the Louisiana Commission found a utility imprudent for failing to resist a violation of a FERC tariff. Even if that ruling could violate the filed rate doctrine, it involved a relatively small issue that will not recur unless

other utilities follow Entergy's unlawful lead. Thus, the issue is not worthy of review.

CONCLUSION

The Order of the Louisiana Commission fully accepted the requirements of Entergy's FERC tariff for the purpose of determining whether ELI's inaction was prudent. ELI was found wanting because it failed to resist the tariff violation. Thus, the ruling is consistent with federal law. Additionally, the issue has little importance and is not likely to recur. Therefore, the writ should be denied.

Respectfully submitted,

MICHAEL R. FONTHAM*
PAUL L. ZIMMERING
NOEL J. DARCE
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
(504) 581-3200

Counsel for Respondent

**Counsel of Record*

September 30, 2002

APPENDIX A

Section 2
Page 1 of 2

2/19/98

Entergy Louisiana, Inc.
Evaluation Period Revenue Adjustment
($000's Omitted)

Line No.		Amount		Reference
1	**Formula Rate Plan Revenue Adjustment (1)**		**(57,819)**	
	Waterford 3 Revenue Adjustment (2)			
2	Property Tax – 1995 FRP Revenue Rqmt	(31,325)		WP 14-4
3	Property Tax – Actual Tax Paid Revenue Rqmt	18,257		WP 14-1
4	Waterford 3 O&M Deferral Termination	(10,378)		WP 14-2
5	Sub-Total	(23,446)		
6	LPSC Retail Allocation Factor	98.188%		WP 14-9
7	Sub-Total Waterford 3 Adjustment – LPSC Retail		(23,021)	

8	Waterford 3 Property Tax True-Up – LPSC Retail	(3,723)	WP 14-6
9	**Total Waterford 3 Revenue Adjustment**	**(26,744)**	
10	**Net Revenue Adjustment for the Evaluation Period**	**(84,563)**	

Note:

(1) See Section 2, Page 2 for the development of the revenue adjustment prepared in accordance with Attachment G of Rider Schedule FRP.

(2) Prepared in accordance with LPSC Order U-20925-B.

APPENDIX B

App. 3

ENTERGY LOUISIANA INC
RIDER FRP REVENUE REDETERMINATION FORMULA
EVALUATION PERIOD ENDED DECEMBER 31, 1996
($000 OMITTED)

SECTION 1

BANDWIDTH CHECK FOR RATE SCHEDULE FRP

LINE NO	DESCRIPTION	REFERENCE		
1	Earned Rate of Return on Common Equity	Section 3, Page 1, Line 24		15.04%
2	Evaluation Period Cost Rate For Common Equity	Section 4		10.50%
3	Customer Satisfaction Rating Adjustment	Section 5		0.00%
4	Performance Adjusted Cost for Common Equity	Line 2 + Line 3		10.50%
5	If Line 4 + 0.8% < Line 1	11.30%	TRUE	GO TO Section 2
6	If Line 4 – 0.8% > Line 1	9.70%	FALSE	
7	Otherwise			No Rate Change

SECTION 2

UPPER BAND RATE ADJUSTMENT

	DESCRIPTION	REFERENCE		
8	Earned Rate of Return on Common Equity	Line 1	15.04%	
9	Upper band	Line 4 + 0.8%	11.30%	
10	Reduction to Upper Band	Line 8-Line 9	3.74%	
11	Reduction in Earned Rate of Return on Common Equity	60% of Line 10		2.24%
12	If Line 11 ≤ 0.05%			No Rate Change
13	If Line 11 > 0.05%			
14	Reduction in Earned Rate of Return on Common Equity	Line 11		2.24%
15	Common Equity Capital Ratio	Section 6, Line 5, Column B		41.37%
16	LPSC Retail Rate Base	Section 3, Page 1, Line 19		$2,708,048
17	Revenue Conversion Factor	Section 3, Page 1, Line 16		1.6350
18	Reduction in Rider FRP Revenue	Line 14 * Line 15 * Line 16 * Line 17		$41,030

SECTION 3

LOWER BAND RATE ADJUSTMENT

	DESCRIPTION	REFERENCE	
19	Lower Band	Line 4 – 0.8%	%
20	Earned Rate of Return on Common Equity	Line 1	%
21	Increase to Lower Band	Line 19 – Line 20	%

22	Increase in Rate of Return on Common Equity	60% of Line 21	%
23	If Line 22 ≤ 0.05%		No Rate Change
24	If Line 22 > 0.05%		
25	Increase in Rate of Return on Common Equity	Line 22	%
26	Common Equity Capital Ratio	Section 6, Line 5, Column B	%
27	LPSC Retail Rate Base	Section 3, Page 1, Line 19	$
28	Revenue Conversion Factor	Section 3, Page 1, Line 16	
29	Increase in Rider FRP Revenues	Line 25 * Line 26 * Line 27 * Line 28	$

SECTION 4

TOTAL RIDER FRP REVENUE

	DESCRIPTION	REFERENCE	
30	Annualized Evaluation Period FRP Revenue	Section 10, Page 10-1-28	($16,789)
31	Reduction/Increase in Rider FRP Revenues	- Line 18 or + Line 29	($41,030)
32	Total Rider FRP	Line 30 + Line 31	($57,819)

NOTE:
(1) Prepared in accordance with Attachment G of Rider Schedule FRP.

EXHIBIT
JOINT # 2

STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON, L.L.P.
COUNSELLORS AT LAW
546 CARONDELET STREET
NEW ORLEANS, LOUISIANA 70130-3535
(504) 581-3200
FAX (504) 581-3361

FAX COVER LETTER

File Number: 38,019

TO: Margot G. Augustin, Esq. FAX NO.: 576-5579

FROM: Paul L. Zimmering, Esq. CONFIRMATION NO.: 576-2764

DATE: February 6, 1998 TIME: _____

Total number of pages, including this cover page: 7

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE (504) 581-3200 EXT. 414 OR EXT. 638 AS SOON AS POSSIBLE.

COMMENTS: _____

CONFIDENTIALITY NOTICE

This facsimile transmission (and/or the documents accompanying it) may contain confidential information belonging to the sender which is protected by the attorney-client privilege. The information is intended only for the use of the individual or entity named above. If you are not

the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone to arrange for return of the documents.

Thank you.

Return To: PLZ

J. Wayne Anderson
Legal Services
Deputy General Counsel
Regulatory

January 30, 1998

VIA FACSIMILE AND U.S. MAIL

Michael R. Fontham, Esq.
Paul L. Zimmering, Esq.
Stone, Pigman, Walther, Wittmann & Hutchinson, L.L.P.
546 Carondelet Street
New Orleans, LA 70130-3588

Rebecca Penniman, Esq.
Burke & Meyer
Suite 2000
1100 Poydras Street
New Orleans, Louisiana 70113

Katherine King, Esq.
Randy Young, Esq.
Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P.
22nd Floor
One American Place
Baton Rouge, Louisiana 70825

Mr. John Chavanne
P.O. Box 807
New Roads, Louisiana 70760-0807

Re: LPSC Docket No. U-20925 (1996 and 1997 FRP proceedings)

Dear Counsel:

Pursuant to the conversations among Mike Fontham, Paul Zimmering, Randy Young, John Chavenne, and me, this letter agreement documents the following stipulation by the Louisiana Public Service Commission ("LPSC"), Entergy Louisiana, Inc. ("Entergy Louisiana" or "Company"), the Louisiana Energy Users Group ("LEUG"), and Marathon Oil Company ("Marathon") regarding the resolution of certain issues that have been addressed in Entergy Louisiana's first and second annual Formula Rate Plan proceedings (the "1996 FRP proceeding" and "1997 FRP proceeding," respectively):

1. **Authorized Rate of Return on Common Equity.** The authorized rate of return on common equity approved by the Commission in the 1996 FRP proceeding (10.5%) will be implemented through a prospective adjustment applied as provided in the Formula Rate Plan.

Further, that same authorized rate of return on common equity will be used in the 1997 FRP proceeding, and as part of this settlement, the Company will not oppose the issuance of a credit, the effect of which would be to apply, effective July 1, 1997, that authorized rate of return on common equity in the calculation of the rate adjustments required by the Formula Rate Plan. The Company agrees to this with a full reservation of its rights in future Formula Rate Plan proceedings, and notwithstanding its position that such retroactive application is not appropriate pursuant to the Formula Rate Plan under the circumstances of this case.

Additionally, that same ROE will be the approved ROE for purposes of the 1998 FRP proceeding and will be reflected in the Company's 1998 FRP filing, if an FRP filing is made by the Company in 1998.

2. **Capital Structure (gross vs. net proceeds of debt).** In consideration of Company's agreement with respect to item 1 above, the Commission agrees that it will not rule on the capital structure issue in the 1996 FRP proceeding, agrees that the record developed in the 1996 FRP proceeding with respect to the capital structure issue will be merged with the record developed in the 1997 FRP proceeding with respect to that same issue, agrees that the testimony and evidence on this same issue developed in the 1997 proceeding will be completed in accordance with the current schedule for the 1997 proceeding, and agrees that the issue will be tried during the February 1998 hearing currently scheduled to commence on February 16, 1998. The Commission's decision on this issue in the 1997 FRP proceeding, based on the record of the hearing conducted in February 1998, will be effective prospectively only from the date of the Commission's order.

3. **Other issues in the 1996 FRP proceeding**. The Commission's decision as it relates to all other issues in the 1996 FRP proceeding will be applied prospectively following the issuance of an order by the Commission in calculating the amount of the resulting rate adjustment to be implemented pursuant to the 1996 FRP proceeding. The correction to the LIPS rate adjustment, however, will be applied retroactively effective July 1, 1996.

4. **MSS-1 Billings**. This stipulation does not address issues relating to MSS-1 billings to the Company under the System Agreement, and shall have no effect upon the litigation or resolution of such issues in the 1997 FRP proceeding.

5. **Other issues in the 1997 FRP proceeding**. All other issues in the 1997 FRP proceeding will be settled as follows, and except as specifically provided herein below, will be implemented prospectively following the issuance of an order by the Commission approving the terms of this settlement:

   a. **Restructuring costs**. Restructuring costs accrued, but not expended, in the 1996 evaluation period (having a value of $1.553 million) will be removed from the Company's revenue requirement for purposes of adjusting rates pursuant to the Formula Rate Plan. This adjustment will be applied effective July 1, 1997.

   b. **SERI rate increase**. This issue will be resolved in accordance with the provisions of the Proposed SERI Refund Procedure, a copy of which is attached hereto and made a part hereof.

   c. **SFI Period Costs**. Issues relating to the Company's SFI Period Costs will have no effect on the rate adjustments implemented pursuant to the 1997 FRP proceeding.

   d. **Other issues**. No adjustment will be made with respect to any other issues raised in the 1997 FRP proceeding.

Please indicate your agreement with the stipulations set forth above by executing the jurat below, sending a copy to me via facsimile, and returning the signed original to me, retaining a copy for your records. I will distribute a copy of the executed letters to everyone.

The Company is performing the calculations to lower base rates by means of a rider and to provide the credits with respect to those items that relate to dates past. Assuming that we receive everyone's agreement to this

stipulation, we will have bill inserts printed and believe that we can be ready to implement the prospective reductions by late February, with credits appearing on customer bills approximately one month later.

Sincerely,

/s/ Wayne Anderson
J. Wayne Anderson

Agreed and Accepted:

By: /s/ Paul L. Zimmering
Representing: LPSC Staff

OUTLINE

SERI REFUND PROCEDURE FOR ELI

1. For purposes of the 1997 Rider FRP adjustments, any future Rider FRP filings, and any general rate reviews conducted prior to the issuance of a final FERC order in FERC Docket No. ER95-1042-000 ("SERI Case"), the level of Grand Gulf capacity costs reflected in ELI's base rates shall be the level defined by the FERC Administrative Law Judge's initial Decision issued in the SERI Case on July 11, 1996 ("Interim Grand Gulf Cost Level"). Entergy Louisiana shall defer amounts representing the difference between the interim Grand Gulf Cost Level and the level of Grand Gulf capacity costs actually billed to the Company by SERI pending implementation of a final decision by the FERC.

2. The Rider FRP Rate Adjustments shall be revised to reflect the interim Grand Gulf Cost Level on a prospective basis only, subject to refund or surcharge

upon the implementation of a final decision by the FERC in the SERI case.

3. The Refund/Surcharge Period shall commence on July 1, 1997, the date on which the full amount of the Grand Gulf capacity costs were reflected in ELI's base rates subject to refund or surcharge pending the implementation of a final decision by the FERC in the SERI case, and shall continue until the date revised Rider FRP Rate Adjustments (or other rates) reflecting the final FERC decision in the SERI Case are implemented ("Final Rates").

APPENDIX C

Minutes

Entergy Operating Committee
September 30, 1997
Attendance: 14

Entergy Arkansas, Inc.	1
**Jim Pilgrim	
Entergy Gulf States, Inc.	1
*Karen Johnson	
Entergy Louisiana, Inc.	1
*John Cordaro	
Entergy Mississippi, Inc.	1
*Don Meiners	
Entergy New Orleans, Inc.	1
*Dan Packer	
Entergy Services, Inc.	9
*Frank Gallaher (Chairman)	
Jim Kenney	
Ken Turner	
Louis Buck	
Jim Rider	
Larry Ables	
Bill Aycock	
Bob Hawkins	
Bob Grenfell	

*Committee members
**Proxy for Drake Keith

MINUTES
ENTERGY OPERATING COMMITTEE
September 30, 1997

Mr. Gallaher convened the meeting at 9:00 a.m.

AGENDA

I.
II. '98 Capacity Plan
III. '98 Load & Capability
IV. Extended Reserve Shutdown Units
V.

VI. Next meeting

ITEM I –

ITEM II – '98 CAPACITY PLAN

Ken Turner briefed the Committee on the status of the '98 Capacity Plan. No recommendation was made regarding the '98 capacity plan since the analysis is not yet complete. (Appendix B)

ITEM III – '98 LOAD & CAPABILITY

Ken Turner presented the '98 Load & Capability Forecast to the committee for approval for planning purposes. (Appendix C)

Motion was made by John Cordaro, seconded by Don Meiners that the '98 Load & Capability Forecast be approved, as presented, for planning purposes. Motion passed.

ITEM IV – EXTENDED RESERVE SHUTDOWN UNITS

Ken Turner discussed the Federal Energy Regulatory Commission's ("FERC") recent order adopting the proposed

amendment to Service Schedule MSS-1 intended to address the generating units currently in extended reserve shutdown ("ERS") and the treatment of those units under the System Agreement. The amendment provides, in relevant part, as follows:

> *A unit is considered available to the extent the capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling, or (3) is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future system requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.*

Based on the information Mr. Turner discussed under agenda items II and III, a motion was made by Don Meiners and seconded by Karen Johnson that the units currently in ERS should continue to be deemed "available" for purposes of determining Company Capability, as that term is defined in Section 10.02 of the System Agreement. Motion passed.

ITEM V

APPENDIX C

ENERGY ELECTRIC SYSTEM
1998 LOAD & CAPABILITY FORECAST
(MW)

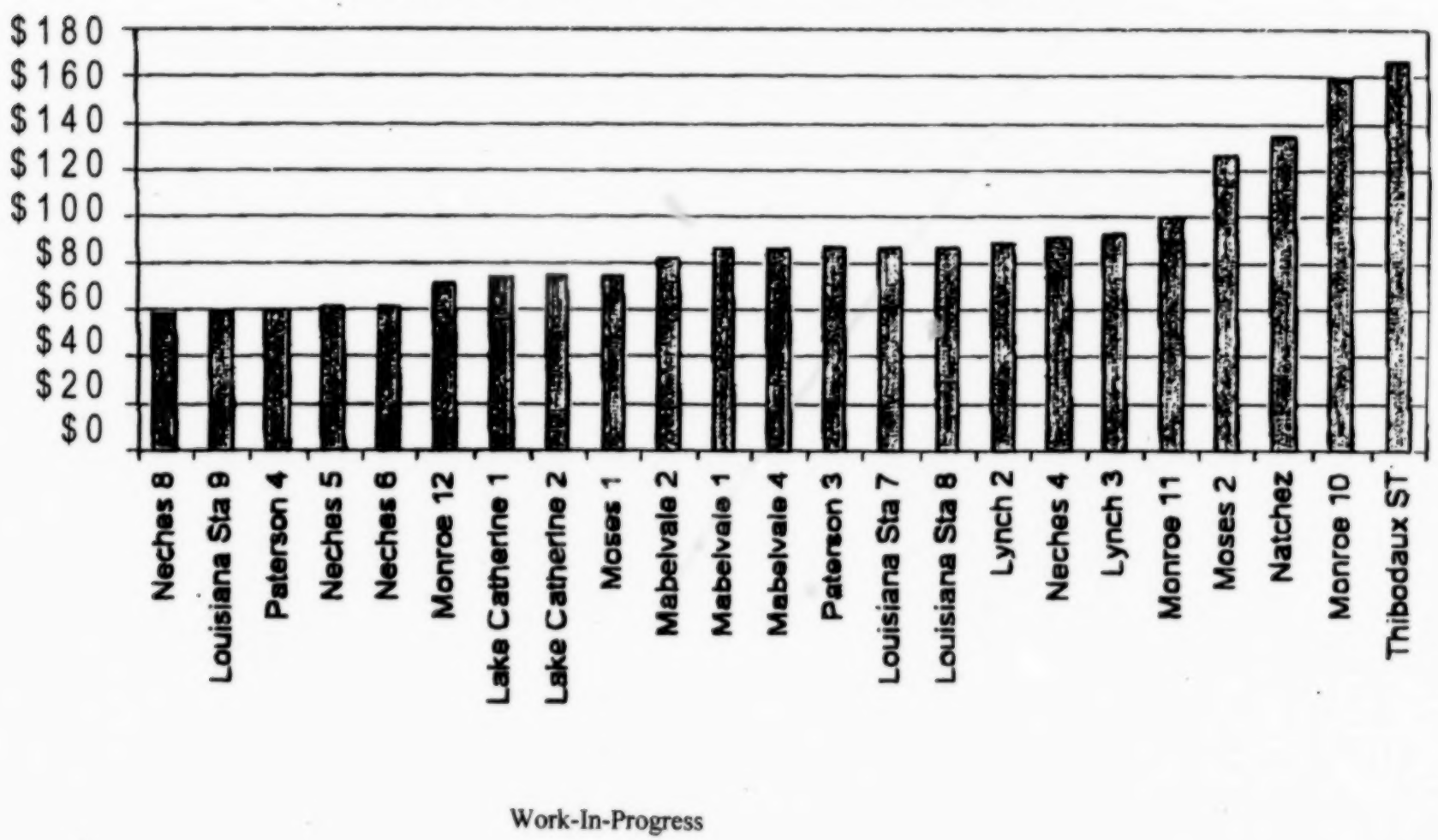
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
DEMAND-SIDE REQUIREMENTS										
1. NATIVE LOAD REQUIREMENTS	19,541	19,515	19,787	20,031	20,217	20,366	20,522	20,676	20,859	21,028
2. DEMAND-SIDE RESOURCES	(1,249)	(1,140)	(1,144)	(1,147)	(1,144)	(1,108)	(1,041)	(907)	(908)	(909)
3. FIRM NATIVE LOAD (1+2)	18,292	18,375	18,643	18,884	19,073	19,258	19,481	19,769	19,951	20,119
4. RESERVE REQUIREMENTS	2,744	2,756	2,796	2,833	2,861	2,889	2,922	2,965	2,993	3,018
5. STAND-BY CAPACITY SALES	146	174	175	177	201	231	248	276	298	321
6. CAPACITY SALES W/OP RESERVES	220	220	220	160	160	160	160	160	160	160
7. CAPACITY SALES FROM RESERVES	1,058	1,058	378	350	350	400	400	400	500	500
8. REQUIREMENTS FOR LOAD (3+4+5+6+7)	**22,460**	**22,583**	**22,212**	**22,404**	**22,645**	**22,938**	**23,211**	**23,570**	**23,901**	**24,118**
SUPPLY-SIDE RESOURCES										
9. GENERATION CAPABILITY	22,730	22,743	22,664	22,678	22,678	22,678	22,678	22,678	22,678	22,678
10. ADDITIONS/RETIREMENTS/RERATES	13	(79)	14	0	0	0	0	0	0	0
11. PURCHASES W/O RESERVES	492	491	491	491	491	490	533	890	990	990
12. TOTAL CAPABILITIES (9+10+11)	**23,235**	**23,155**	**23,169**	**23,169**	**23,169**	**23,168**	**23,211**	**23,568**	**23,668**	**23,668**
13. EXTENDED RESERVE SHUTDOWN	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)	(1,284)
14. OPERATIONAL CAPABILITY (12+13)	**21,951**	**21,871**	**21,885**	**21,885**	**21,885**	**21,884**	**21,927**	**22,284**	**22,384**	**22,384**
RESERVE MARGIN										
15. RESOURCE SURPLUS/(DEFICIT) (12-8)	775	572	957	765	524	230	0	(2)	(233)	(450)
16. % RESERVE MARGIN (100*(4+15)/3)	**19.2%**	**18.1%**	**20.1%**	**19.1%**	**17.7%**	**16.2%**	**15.0%**	**15.0%**	**13.8%**	**12.8%**
17. OPERATIONAL SURPLUS/(DEFICIT) (14-8)	(509)	(712)	(327)	(519)	(760)	(1,054)	(1,284)	(1,286)	(1,517)	(1,734)

NOTES:
Line 4. Reflects a 15% target reserve margin.
Line 15. Any resource deficit will be supplied in accordance with the System's Integrated Resource Plan.
Line 17. Operational deficits will be made up through short-term purchases, return-to-service of units on extended reserve shutdown, or other operational actions.

DATE: 09/26/97
Case No. L09117RO

Capacity Alternative - RTS

Proposed Return to Service Units



APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Louisiana Public Service Commission, Petitioner	)	
v.	)	No. 97-1661
Federal Energy Regulatory Commission, Respondent	)	

RESPONSE OF FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION TO LOUISIANA PUBLIC SERVICE COMMISSION'S MOTION TO ENFORCE JUDGMENT ON REMAND OR ALTERNATIVELY PETITION FOR WRIT OF MANDAMUS

Pursuant to Fed. R. App. P. 21(b) and Circuit Rule 21, the Federal Energy Regulatory Commission (the "Commission") submits this response in opposition to the Louisiana Public Service Commission's ("Louisiana PSC") motion to enforce judgment on remand of this Court's decision in *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) ("*Louisiana PSC*") or, alternatively, to issue a writ of mandamus pursuant to 28 U.S.C. § 1651(a), 5 U.S.C. §§ 555(b), 706(l) and 16 U.S.C. §§ 824d, 824e. As the basis for its request for such extraordinary action, Petitioner claims the Commission has unreasonably delayed acting on the *Louisiana PSC* remand. There are no grounds for such a claim.

* * *

> and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

Id. at 80 (citations omitted). As now demonstrated, Petitioner fails to satisfy these criteria.

With regard to the first factor, the seven and one-half months since the Court's mandate issued on September 27, 1999, is well within the "rule of reason."[1] From October 26, 1999 to December 23, 1999, the parties filed pleadings with the Commission containing evidence and argument for the Commission's consideration on remand. Moreover, Louisiana PSC has filed an additional complaint putting before the Commission a request for revisions to the Entergy system agreement in light of retail competition and its impact on cost allocation under the agreement. This in turn has spawned further filings to the Commission. Thus, the Commission must devote time not only to the specific considerations raised by the Court's remand, but to the filings engendered by the remand and

* * *

[1] In contrast, the cases in which mandamus relief has been granted have involved agency delays of years in reaching an initial decision. *See, e.g., MCI Telecomm. Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (four year delay); *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (ten year delay). *Cf. Wellesley, Concord and Norwood v. FERC*, 829 F.2d 275 (1st Cir. 1987) ("*Wellesley*") (denying petition for mandamus where the Commission had not acted on remand for 14 months).

APPENDIX E

COMPLETE TRANSCRIPT OF THE SEPTEMBER OPEN SESSION OF THE LOUISIANA PUBLIC SERVICE COMMISSION HELD IN BATON ROUGE, LOUISIANA. PRESENT WERE CHAIRMAN JIMMY FIELD, VICE-CHAIRMAN JAY BLOSSMAN, AND COMMISSIONERS IRMA *MUSE DIXON, DALE SITTIG, AND DON OWEN.*

PAGE NUMBER	***EXHIBIT NUMBER***
1	2
2	2
3	2
4	Passed
5	3
6	4
7	5
8	6
9	6
10	7
11	7
12	8
13	9
14	9
15	10

* * *

[75] was seconded by Mr. Commissioner Owen. Do I hear any objection? (NONE VOICED) Hearing none, it's so ordered.

MS. GONZALEZ: Exhibit No. 31 is a discussion and presentation by Stone Pigman on the recent RTO issues being considered at the FERC.

COMMISSIONER DIXON: Oh I see Mr. Fontham is here. Welcome Mr. Fontham, we thought you were stuck in Washington. We were concerned.

MR. MIKE FONTHAM: Thank you Commissioner.

COMMISSIONER OWEN: Fontham, was the clock running the whole time?

VICE-CHAIRMAN BLOSSMAN: The whole time?

MR. FONTHAM: Commissioner the clock shut off –

VICE-CHAIRMAN BLOSSMAN: As soon as you walked in your house.

MR. FONTHAM: The clock shut off, this is true, the clock shut off four hours before I got home.

COMMISSIONER DIXON: Aw, he gave us 4 hours grace.

MR. FONTHAM: Because that's what it would have been if I'd flown home. Being a good boss, Mr. Zimmering has allowed his young associate to present part of this report.

COMMISSIONER DIXON: We hope y'all get that straight.

MR. FONTHAM: So I get to say a few words with regard to this RTO.

COMMISSIONER SITTIG: So y'all splitting the work?

MR. FONTHAM: He's given me a little piece of it, Commissioner.

COMMISSIONER SITTIG: That way y'all split the cost.

[76] **MR. FONTHAM:** We conserve that way. Rather than just unleash me, he's holding me in harness.

COMMISSIONER SITTIG: Okay.

MR. FONTHAM: Commissioner and Commissioners, as you know, I know you all are aware of the other matter that has been going on in Washington D.C. that is of some very significant concern to you all, virtually every State Commission in the southeast and probably throughout the country. And that relates to the transmission organization that it appears may be mandated by the FERC and more or less, crammed down on State Commissions sometime in the near future. Prior to July the 12th, as you know in our area the Southwest Power Pool and Entergy through a voluntary process had been working for years and intensely for many months to try to put together what's known as a Regional Transmission Organization which would be a transmission organization that would allow for more commerce on the transmission lines and some independent running of the system so that marketers would have fair advantages and so on. But only July 12, the FERC in a rather broad and in many people's opinion, somewhat arbitrary action, made a ruling that rather than have smaller voluntary regional organizations that there should be four regions of the country each of which would be dominated by one transmission organization and that all of the industry participants should get together before an ALJ in Washington D.C. in July and August in order to "mediate" a solution that "everybody

would agree to". The first thing that happened, we and the Staff monitored these proceeding. As you know, [77] the Southeast Region Regulatory Commissioners all tried to arrange to have people to attend and see what was going on although the State Commissions had only a very small voice, one – basically one vote out of about 12, if they had chosen to vote, most of them did not because they did not want to be preempted by the process. In any event, the very first thing that was explained to everybody by the ALJ was that the energy SPP was no longer a viable possibility and that matters were going to go in a different direction, they could just forget voting on an energy SPP RTO or in any other way thinking about an energy SPP RTO. At that time the Energy Corporation had filed a case here to try to get a small TRANSCO and energy TRANSCO for their service territory approved which raised very great concerns for the Staff because of the revenue requirement effect on ratepayers which would be a substantial increase. And the reason for that is that you take the utilitie's assets and you move them out of the utility rate base over to a TRANSCO and what now happens is that if there are any revenues related to transmission at the wholesale level, those revenues come back as a credit to retail rates and we – the Commission can take those credits and reduce the rates so that even if the FERC would raise the rate of return to some big high level, some incentive level, all the revenues are going to come back because the owners of the transmission get the revenue. So that is a big protection for the ratepayer and as soon as you move those assets to a TRANSCO, the money goes to the stockholders so you no longer get that credit and it automatically, without a doubt means that most, you know, any increase at the wholesale level over state revenue requirements will be crammed through the

retail rate and there would be [78] no offset. Well that became very much of a problem because it became very clear at the FERC both openly and in private discussions that a TRANSCO structure with a TRANSCO on top, as it was called, would be the preordained result and it turned out to be the result that the Judge has now recommended. We believe that there are very substantial concerns for this Commission related to this. One is that even though there may be some authority left for this Commission after the FERC rules to decide if these assets can be transferred to a TRANSCO there is a possibility that that authority will be taken away by Federal Preemption. And even if it is not taken away by Federal Preemption, there is a very large possibility, and most likely a strategy embodied in this, under which the utilities would be more or less ordered to go one by one pick off State Commissions and get them to go along with this program. And I think there, you know, if a State Commission were standing alone against the tide there might be a significant amount of momentum that would be difficult to resist. Secondly, we are highly concerned about this by fiat a drawing of a big X through the SPP Entergy arrangement. Most of the power that comes to Louisiana, I'm not talking about what somebody might want to sell to make a profit somewhere else, but most of the stuff that comes to Louisiana other than the TVA, comes from the north and the west. And if the – if it were ordered that Louisiana join up with the southeast, that would be great for the sellers but it may be bad for the buyers. And thirdly, by having one huge region which will most likely put in all kinds of new pricing arrangements, that would be ordered by the FERC, there maybe some very significant cost shifts to Louisiana and some very significant increases in the retail [79] rates both from the cost shift and the pricing. So that is our report as

Mr. Zimmering has, as I believe it to be, has disseminated to you. Perhaps we didn't get it to you in the most advanced manner, but we have provided you a report on all of this and we do have a suggestion as to what the Commission might want to consider doing. And the way we got to this suggestion was in consultation with the Staff, particularly with Mr. St.Blanc, with our consultants, as to what possible action a State Commission may want to take. And you know, this is a matter that we believe would be a good idea, it's not a substantive action at this time. But what we would suggest is to order a rule to show cause why the – and require the utilities to come in, Entergy, SWEPCO, CLECO, to demonstrate why this would be in the public interest or why they should not be forbidden from 1) transferring assets to a TRANSCO 2) disbanning the SPP RTO and instead going to the southeast and 3) accepting the pricing and cost transfer requirements that would be embodied in this Mediation Order. And the theory here is simply this, that if the Commission waits for the FERC to act, we will be a tag along Commission, you know, one of 50 people who has a problem, wants a rehearing and it will be of, I think, of rather small consequence to the FERC that the Louisiana Commission has a problem with what the FERC wants to do. Whereas it will be a matter of rather large consequence to the LPSC what would be the appropriate action in the public interest for Louisiana and if somebody wanted to try to stop the LPSC, assuming the LPSC finds it not to be in the public interest, it would happen on Louisiana turf. And you know, we're not for saying that anybody should decide – pre-decide what the results should be, but we do think to have [80] that proceeding going would be a wise choice either at this meeting or your next meeting.

VICE-CHAIRMAN BLOSSMAN: Well I can say one thing, it sure sounds like everything's all FERCed up. And I think we need to do what we need to do and if we need to issue an Order, a rule to show cause to all the utilities, we need to do it.

COMMISSIONER DIXON: Do you need a motion for that?

CHAIRMAN FIELD: Mr. Zimmering do you have any comments?

MR. ZIMMERING: The only comments I have Commissioners are about the increasing rates. Entergy's filing with this Commission indicated 130 percent increase in bulk transmission rates. So we're not talking about a little bitty increase in rates, it's significant. The second thing is the states we're talking about throwing Louisiana in with are North Carolina, South Carolina, Georgia, Alabama, Tennessee, Mississippi, Arkansas, Louisiana, and a non ERCOT portion of Texas and possibly Florida. So you've got East Texas all the way up to North Carolina.

COMMISSIONER DIXON: You have Tennessee with the Tennessee Valley authority.

MR. ZIMMERING: Tennessee Valley authority, I'm sorry. Yes, Tennessee as well, I'm sorry I didn't mean to miss that Commissioner. The third thing that I would just like to expand on just a little bit is that with Louisiana, if most of Louisiana goes east there's a real good chance Louisiana gets split because there's a very good chance SWEPCO will go with the Southwest Power Pool up [81] north and we would lose both the benefits of SWEPCO and the benefits that are available from Public Service of Oklahoma and I think the last thing this Commission wants

to do is to split the State of Louisiana. Finally I think the concerns that you have about local safety and reliability are simply not going to be the kinds of things that an FERC Ordered RTO of this magnitude is going to be interested in because they're not going to make a big profit on some little feeder line that needs help but it sure makes a big difference to the people in the subdivision right down in your district.

COMMISSIONER DIXON: And what about rates?

MR. ZIMMERING: Rate? I think we're talking about 130 percent increase by Entergy's own estimates.

MR. FONTHAM: And that's – 130 percent means you're double and a half because it's not 30 percent, it's 130 percent on top of what's already there. So you know, that's not all due to joining this organization but just the bureaucracy that they've put together is going to be tens or millions of dollars.

COMMISSIONER DIXON: Let me ask you one quick question. Is any of this stuff safe now that we've had what happened to us last Tuesday? Is that something we ought to be considering when you're talking about transferring all of the assets to four different units rather than having things in all the different states?

MR. FONTHAM: Commissioner I don't know that – I personally I'm not an engineer and I don't know enough about the engineering of it to say that there is a big difference. There were very – the people who were in that room, the [82] engineers, they know what they're doing and I don't really think they're trying to do anything unsafe. I do think though that when you get down to the

local concern aspects of things of you know where you put a transmission line or whether you can have the federal government decide where to put it as opposed to the state government deciding where to put it. You transfer the – if you were to transfer the power there and there's Legislation and Congress that might do that, that would be a big difference in traditional police power. And this is part of that movement.

COMMISSIONER DIXON: And you'll have another layer of bureaucracy over us as it relates to that RTO.

MR. FONTHAM: I think your authority will –

COMMISSIONER DIXON: Diminish.

MR. FONTHAM: Most likely disappear virtually if this is done.

CHAIRMAN FIELD: Mr. Fontham, let me see if I understand this right. You suggest we file a rule to show cause on all utilities owning transmission assets in Louisiana?

MR. FONTHAM: Yes.

CHAIRMAN FIELD: Why they – to show why it's in the public interest 1) to transfer the assets to a TRANSCO –

MR. FONTHAM: Commissioner, Mr. Zimmering was kind enough to give me a cheat sheet, if you would like to see what we are suggesting.

CHAIRMAN FIELD: Right. Now where would you file the rule to show cause, in East Baton Rouge Parish?

[83] **MR. FONTHAM:** No it would be with you all.

COMMISSIONER DIXON: Right here.

MR. FONTHAM: You all would issue a rule to show cause for them to come in and show cause why they should not be prohibited from doing this. So that you know, conceivably you'd be in a timing fashion that's not trailing along after the FERC.

VICE-CHAIRMAN BLOSSMAN: Should I read it then? Okay, a motion for a rule to show cause 1) why CLECO, Entergy Gulf States, ELI and SWEPCO should not be enjoined from transferring their bulk transmission assets, paid for by jurisdictional ratepayers, to a TRANSCO or any similar organization 2) why CLECO, EGSI, ELI and SWEPCO should not be enjoined from joining a Southeast Regional Transmission Organization as opposed to an SPP RTO or other regional organization 3) why the Louisiana Public Service Commission should not declare that the pricing and cost transfers required by the FERC Administrative Law Judge recommendation conflict with the public interest?

COMMISSIONER DIXON: Is that your motion?

VICE-CHAIRMAN BLOSSMAN: That's the motion.

COMMISSIONER DIXON: Second.

COMMISSIONER OWEN: Mike, to your knowledge are any other states considering similar action to this?

MR. FONTHAM: The – my understanding Commissioner is that virtually every state in the southeast has filed for rehearing at the FERC. Some states have filed, I believe an appeal asking that it be enjoined or stopped, the mediation [84] proceedings, I do not know exactly whether anybody has done a rule to show cause. There are some state Commissions who have proceeding's pending and they may use those proceedings to try to do something about this. But this is consistent with the, what I understand to be the Southeast Regulatory Commissioners stance that was taken in the letter that was written to the Chairman of the FERC.

COMMISSIONER OWEN: Would this get the FERC's attention?

MR. FONTHAM: Commissioner, that would be the hope. Now whether it will or not – I mean I think this is a train as far as the FERC is concerned that is moving fast and whether they would pay any attention to it or not, I don't know but if the Commission were to issue an Order in conflict with the FERC then there is a conflict and something has got to be done about it.

COMMISSIONER OWEN: I think we ought to do it. I think it would get their attention.

COMMISSIONER DIXON: I think so. Mr. –

COMMISSIONER OWEN: Excuse me just a second. Isn't there a concern Mike, that these are various transmission systems all stuck together won't necessarily work?

MR. FONTHAM: Commissioner, I think that there has been a legitimate concern raised that this very large region, your trying to come up with, – you know, all

of the sudden instead of planning for – like Entergy, might plan its transmission for parts of four states. Well, and you know they do a pretty good job – you know they have people who know what they're doing. But the – you [85] know, if you all of the sudden say, okay we're going to regulate the transmission system on a 13, 14 state basis with all the power flows and everything else, nobody's ever done that before. You know, it's been done in sort of a coordination type of a way, but from the top down deciding how everything flows, that has not been done before. They're dreaming up ways to deal with congestion –

COMMISSIONER OWEN: Well these systems weren't necessarily designed to do what they would now be expecting them to do.

MR. FONTHAM: None of them were.

VICE-CHAIRMAN BLOSSMAN: Well let me – are you finished Commissioner Owen? I just wanted to sneak in here and say one little quick thing that the new Chairman of the FERC is Pat Wood from Texas and George Bush is from Texas and I would hope that a message would get to the President and I know he's got a lot going on right now not to deal with this, but that's going to increase everybody's rates 130 percent across the whole region. And if he likes being President and he lets Pat Wood do something like that, he won't be President in four years. I mean people – this affects their pocket book dramatically every month and if we got to increase rates in our state 130 percent and Mississippi has to do it, and Alabama has to do it, and Georgia has to do it, and Tennessee has to do it, all those state voted for Bush and I'm telling you I hope he's paying attention. I don't know if he's worried about what we're doing here in Baton Rouge

but that's a serious challenge that he's letting Pat Wood do.

MR. FONTHAM: The only state in the nation, well there are two states in the

* * *